In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 898

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 1a-5a, reported at 287 F. Supp. 129) dismissing the appellants' consoli-

dated suits with respect to certain orders of the Interstate Commerce Commission. Those orders had initially suspended proposed motor carrier rate schedules; although the orders were annulled by the Commission when the motor carriers cancelled the schedules, the appellants (shippers) sued to "enforce" them.

The factual context of this case is simple and undisputed. In 1967, two motor carrier tariff bureaus filed with the Commission new rate schedules on behalf of their carrier members, proposing 5 percent increases on less-than-truckload and any-quantity traffic and 3 percent increases on truckload and volume traffic. Upon consideration of protests filed by a number of shippers and shipper associations, including appellants, the Commission's Board of Suspension issued an order (pursuant to Section 216(g) of the Interstate Commerce Act, 49 U.S.C. 316(g)) instituting an investigation into the lawfulness of the proposed rates and suspending the schedules for the statutory maximum period of seven months, subject, however, to possible further orders of the Commission (J.S. 6a-8a). Recognizing that they had not sufficiently supported the lawfulness of the proposed rates, the tariff bureaus notified the Commission that, pursuant to the Commission's standing Special Permission No. M-94200 (J.S. 15a-16a), they were cancelling the schedules.

Thereafter, the tariff bureaus republished the same rate increases in new proposed tariffs, and submitted comprehensive material explaining the bases for the proposed rate increases and including current data

on costs and revenues. Shortly after the new tariffs had been filed but before they were to become effective, the Commission's Board of Suspension, noting that the carrier bureaus had cancelled the original schedules, discontinued the investigation-and-suspension proceedings (J.S. 9a-10a). Appellants thereupon filed (1) a petition for reconsideration of the Board's order discontinuing the investigation-and-suspension proceedings, and (2) motions to reject the new tariffs or to amend the earlier investigation and suspension order, urging that the earlier order applied to the new tariffs. The petition for reconsideration was denied by Division 2 of the Commission, acting as an Appellate Division, and appellants were notified that such action rendered moot their motions for rejection or amendment of the new tariffs (J.S. 3a).

Appellants and others then filed protests to the new schedules, but upon consideration of those protests and the carrier bureaus' new justifications, the Commission's Board of Suspension decided not to suspend or investigate. Appellants sought reconsideration of this decision, and Division 2 of the Commission, as an Appellate Division, sustained the determination not to suspend the schedules but concluded that one of the schedules should be investigated to determine the lawfulness of its rates.

Thereafter, appellants filed complaints in the district court, seeking "enforcement" of the initial investigation-and-suspension order. The three-judge district court unanimously dismissed the complaint. Appellants' principal contention was that the original suspension order remained outstanding and thus ren-

dered unlawful the republication of new tariffs proposing the same rates. The district court rejected this argument as without merit, noting that the entire suspension proceeding had been terminated (J.S. 4a). The court also held that the decision not to suspend the new rate schedules was unreviewably committed by statute to the Commission's discretion (J.S. 4a-5a) and that appellants' complaints were premature in light of the availability of appropriate administrative remedies to test the lawfulness of the new rates (J.S. 5a).

ARGUMENT

1. The court below correctly recognized (J.S. 4a-5a) that appellants' position seeks to evade the settled law that the Interstate Commerce Act confers upon the Commission exclusive discretionary power to determine whether or not to suspend and investigate a proposed rate change. *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 667-668. Appellants, who unsuccessfully sought to have the Commission suspend the second proposed rate increases, now seek the same goal by indirection.[1] Their suits purport to seek "enforcement" of the original investigation-and-suspension order of the Board of Suspension. But this order was clearly annulled when, following cancellation of the tariffs under suspension, the Board discontinued the proceedings entirely.[2] Thus, the relief

[1] See, *e.g.*, *White* v. *Cotzhausen*, 129 U.S. 329, 344.

[2] Moreover, since Section 216(g) of the Act, 49 U.S.C. 316 (g), permits suspension of a schedule only for seven months

appellants seek (see J.S. 3a-4a) would necessarily involve setting aside the subsequent orders of Division 2 declining to reconsider the Board's vacation of its investigation-and-suspension order or to suspend the newly filed and additionally supported schedules. The court below thus correctly concluded that these suits are impermissible attacks on the Commission's "sole and exclusive power" to suspend or not to suspend proposed rates and that Congress has "withdraw[n] from the judiciary" any review of the Commission's discretion in this regard. *Arrow Transportation Co.* v. *Southern Ry. Co., supra,* 372 U.S. at 667.[3]

2. Appellants point out that the initial investigation-and-suspension order had not yet been formally vacated when the carriers republished the increased rates in new tariffs (J.S. 10-12), and from this they argue that republication of identical rates was improper. But it is clear that republication was effected *after* the carrier bureaus, acting pursuant to a special permission (J.S. 15a-16a) of the Commission, had cancelled their original schedules, and the new schedules were not to become *effective* until *after* the investigation-and-suspension proceedings had been discon-

---

from the date the schedule would have taken effect (here, July 15, 1967; see J.S. 6), and since the period cannot be extended by the Commission or the courts (*Arrow Transportation Co.* v. *Southern Ry. Co., supra*), the initial suspension order expired on February 15, 1968, by operation of law and could not thereafter have been judicially enforced.

[3] See, also, *Oscar Mayer & Co.* v. *United States,* 268 F. Supp. 977, 980-981 (W.D. Wis.); *Seatrain Lines, Inc.* v. *United States,* 233 F. Supp. 40, 47 (D. N.J.); *Movers' and Warehousemen's Ass'n* v. *United States,* 227 F. Supp. 249, 251 (D. D.C.).

tinued. The Commission was not required, as appellants suggest, to refuse to receive the new schedules for filing until after the suspension order had been formally annulled, since the schedules to which the suspension order applied had already been cancelled by the carrier bureaus pursuant to Commission authorization.[4] Furthermore, the suspension order was not directed at the proposed new rates in the abstract, but rather was entered upon the record made in the original proceeding. There is no sound reason why the discretion to suspend or not to suspend new schedules must be automatically pre-empted by a prior decision on rates of the same level; the better rule, which the Commission followed, is that the new rates stand or fall on the new record that is made.

3. As the court below concluded (J.S. 5a), the Commission's decision not to suspend the new schedules is necessarily only a preliminary determination. Thus, while deciding not to suspend, the Commission has determined that one of the proposed rate schedules should be investigated to ascertain its lawfulness. Appellants are entitled to participate in that investigation and thereafter to seek judicial review of any adverse, final agency action.[5] Moreover, appellants

---

[4] If such a cancellation had not been authorized, the Commission might well have rejected for filing any subsequent tariff. See, *e.g.*, *Cancellation of Joint Fares Between District of Columbia and Nearby Virginia*, 47 M.C.C. 205.

[5] This course was followed by aggrieved parties in *Central and Southern Motor Freight Tariff Ass'n* v. *United States*, 273 F. Supp. 823 (D. Del.), and *Eastern Central Motor Carriers Ass'n* v. *United States*, 239 F. Supp. 591 (D. D.C.), cited by appellants (J.S. 13).

may test the lawfulness of the rates not covered by the investigation order by following the express administrative remedies afforded them by Section 216 (e) of the Interstate Commerce Act, 49 U.S.C. 316 (e). Until they have availed themselves of such remedies, they cannot be heard to complain (J.S. 5a).[6]

CONCLUSION

The judgment of the district court dismissing the complaints should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ROBERT A. HAMMOND, III,
Acting Assistant Attorney General.

HOWARD E. SHAPIRO,
ARTHUR I. CANTOR,
Attorneys.

ROBERT W. GINNANE,
General Counsel.

PHILIP W. GETTS,
RAYMOND M. ZIMMET,
Attorneys,
Interstate Commerce Commission.

FEBRUARY 1969.

---

[6] See, *e.g.*, *Coastwise Line* v. *United States*, 157 F. Supp. 305, 306 (N.D. Calif.); *National Water Carriers Ass'n* v. *United States*, 126 F. Supp. 87, 90-91 (S.D. N.Y.); *Cf. Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540, 544-545; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 331917 458